8, 1995, in response to AT&T's Direct Case in AT&T Contract Tariff No. 374, Transmittal Nos. CT 2952 and CT 3441, CC Docket No. 95-133, that this interpretation is unsupported -- and indeed, contradicted -- by relevant precedent. For the sake of brevity, TRA will not repeat such argument here.

In its Reply, filed in an earlier stage of this proceeding,[34] AT&T asserted incorrectly that the *Sierra-Mobile* doctrine applies only to intercarrier agreements that are publicly filed but not made generally available.[35] Not only is TRA unaware of any precedent for this proposition, but the U.S. Court of Appeals in MCI, *supra*, rejected a similar statement by the Commission in applying the *Sierra-Mobile* doctrine.

There, MCI and a group of other common carriers ("OCCs") challenged a Commission order that certain tariff revisions by the Bell System Operating Companies and AT&T did not violate a 1975 Settlement Agreement between the Bell System and the OCCs which resolved a Commission investigation of the Bell System's tariffed rates for OCCs' use of its facilities.[36] On review, MCI argued that the Commission's order violated the *Sierra-Mobile* doctrine, and the Court of Appeals agreed.

The Court dismissed the position of the Commission, which was similar to the position taken by AT&T in its Reply in this proceeding, as follows:

> The FCC says the doctrine does not apply to the present Settlement Agreement because Bell's rate relationship with the OCCs was governed by tariffs, not by the Agreement. That contention is without merit. A contract, such as the Agreement here, may refer to rates included in a tariff and yet

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[34] Reply of AT&T Corp., filed February 16, 1995.

[35] Id. at 7, n. 10.

[36] MCI, 665 F.2d at 1301.

continue to enjoy protection under *Sierra-Mobile*. *Richmond Power & Light v. FPC*, 481 F.2d 490 (D.C. Cir. 1973). Contracts and tariffs are not always mutually exclusive, but may be used in concert to define the relationship of the parties. In such circumstances, the contract governs the legality of subsequent tariff filings. "Rate filings consistent with contractual obligations are valid; rate filings inconsistent with contractual obligations are invalid." *Id.* at 493.

> Nor is protection under *Sierra-Mobile* forfeited where, as here, the contract contemplates changes in the agreed rates.
>
> > [The *Sierra-Mobile*] principles apply whether the parties agree to a specific rate or whether they agree to a rate changeable in a specific manner.
>
> *Id.* at 497.

MCI, 665 F.2d at 1302 (emphasis added).

The Court explicitly rejected the contention that *Sierra-Mobile* applies only in the context of agreements between one carrier and one customer, as asserted in this proceeding by AT&T:

> The FCC also says the Settlement Agreement does not come within *Sierra-Mobile* because it is not a private contract between two carriers, but is a "consensus agreement between the Bell System and representatives of several different industries." That position is equally untenable. A contract inevitably evidences a "consensus agreement" among its signatories. That more than two parties sign an agreement does not render it less binding on each of those signatories.

MCI, 665 F.2d at 1302.

In addition to the clear meaning of the Court's words that multi-party agreements entered into in combination with filed tariffs may nevertheless be subject to protection under *Sierra-Mobile*, the cases cited by AT&T serve only to support, not negate, application of the *Sierra-Mobile* doctrine to cases where contracted-for rates and terms are filed and made available to similarly situated customers.

In United Gas Pipe Line Co. v. Mobile Gas Service Corp.,[37] for example, the Supreme Court interpreted the Natural Gas Act, 15 U.S.C. §§ 717, *et seq.*, as follows:

> In construing the Act, we should bear in mind that it evinces no purpose to abrogate private rate contracts as such. To the contrary, by requiring the contracts to be filed with the [Federal Power] Commission, the Act expressly recognizes that rates to particular customers may be set by individual contracts. . . .
>
> [A]ll rates are established initially by the natural gas companies, by contract or otherwise, and all rate are subject to being modified by the Commission upon a finding that they are unlawful. . . .
>
> The basic power of the Commission is that given it by §5(a) [of the Natural Gas Act] to set aside and modify any rate or contract which it determines, after hearing, to be 'unjust, unreasonable, unduly discriminatory, or preferential.'

Id., 250 U.S. at 338, 341.

The Court explained further, in words that could be applied to resellers' purchase of communications services under Contract Tariffs:

> Our conclusion that the Natural Gas Act does not empower natural gas companies unilaterally to change their contracts fully promotes the purposes of the Act. By preserving the integrity of contracts, it permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry. Conversion by consumers, particularly industrial users, to the use of natural gas may frequently require substantial investments which the consumer would be unwilling to make without long-term commitments from the distributor, and the distributor can hardly make such commitments if its supply contracts are subject to unilateral change by the natural gas company whenever its interests so dictate. . . . On the other hand, denying to natural gas companies the power unilaterally to change their contracts in no way impairs the regulatory powers of the Commission, for the contracts remain fully subject to the paramount power of the Commission to modify them when necessary in the public interest. The Act thus affords a reasonable accommodation between the conflicting interests of contract stability on the one hand and public regulation on the other.

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[37] *Supra*, note 30.

Id., 350 U.S. at 344.

The facts of the companion case of Federal Power Commission v. Sierra Pacific Power Co.,[38] which reached the same result as Mobile, are startling similar to those presented in the instant proceeding. As the Supreme Court related,

> In 1947 Sierra, faced with increased postwar demands and consumer agitation for cheaper power, began negotiating for power from other sources . . . . To forestall the potential competition, PG&E offered Sierra a 15-year contract for power at a special low rate, which offer Sierra finally accepted in June 1948. The contract was duly filed with the Federal Power Commission.
>
> Early in 1953, when power from [a competitor] was no longer available to Sierra, PG&E, without the consent of Sierra, filed with the Commission . . . a schedule purporting to increase its rate to Sierra by approximately 28%.

Sierra, 350 U.S. at 351-52.

When the Federal Power Commission found the contract rate to be unreasonable on the grounds that it yielded less than a fair return on investment, the Supreme Court rejected the Commission's reasoning and elaborated on the public interest standard inherent in the *Sierra-Mobile* doctrine, writing:

> [W]hile it may be that the Commission may not normally *impose* upon a public utility a rate which would produce less than a fair return, it does not follow that the public utility may not itself agree by contract to a rate affording less than a fair return or that, if it does so, it is entitled to be relieved of its improvident bargain. . . . In such circumstances the sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest -- as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory. . . . [I]t is clear that a contract may not be said to be either "unjust" or "unreasonable" simply because it is unprofitable to the public utility.

Id., 350 U.S. at 355.

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[38] *Supra,* note 30.

If the *Sierra-Mobile* doctrine is found to apply to Contract Tariffs such as CT No. 360, the carrier seeking to alter the tariff materially should be required to demonstrate that the proposed revision is in the public interest, or, in the alternative, that the tariff terms the carrier seeks to revise are not in the public interest, or the revision should be rejected.

## III.

## CONCLUSION

For the foregoing reasons, the Bureau should find that the substantial cause test applies to all long-term service arrangements where the customer has reasonably relied on the stability of the terms, regardless of the form of the arrangement or whether the services at issue are subject to streamlined regulation. The standard for substantial cause should include consideration of contract law principles and a balancing of carrier and customer interests, and should be no less rigorous for streamlined offerings than for others. Even if a carrier can demonstrate substantial cause, if a proposed revision materially alters the terms of a long-term arrangement, the existing customer should either be "grandfathered" or permitted to terminate the arrangement without liability. The *Sierra-Mobile* doctrine is applicable to unilateral carrier revisions of filed contract-based tariffs, and requires a showing that the public interest is served by a proposed revision before the revision should be permitted.

Respectfully submitted,

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